ORIGINAL

STATE OF MICHIGAN
IN THE SUPREME COURT
APPEAL FROM THE COURT OF APPEALS
(TALBOT PJ, and KELLY and HOOD JJ)

CHARLENE TATE,

Plaintiff-Appellant,

v.

CITY OF DEARBORN,

Defendant-Appellee.

Supreme Court No. 129241
Court of Appeals No. 261950
Wayne Circuit Court
Case No. 04-404500 NO
Hon. Daphne Means Curtis

PLAINTIFF-APPELLANT'S BRIEF ON APPEAL

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

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Introduction

Pursuant to MCR 7.301(A)(2), this Court has granted leave to appeal from the May 17, 2005 Order of the Court of Appeals [Talbot P.J., and Kelly and Hood JJ] which, in lieu of granting the City of Dearborn's application for interlocutory leave to appeal from Wayne Circuit Judge Daphne Means Curtis's April 5, 2005 Order denying summary disposition, peremptorily reversed on res judicata grounds. This Court's January 13, 2006 Order directed the parties to include among the issues briefed: "(1) whether application of the rule of *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372 (1999), to this case tends to encourage gamesmanship by giving plaintiffs an incentive to fail to plead a theory in federal court, with the hope of later litigating that theory in state court, because it was arguably possible, or even probable, that the federal court would have declined to exercise its jurisdiction; (2) whether there are distinguishing factors between this case and *Pierson, supra*; (3) whether, if a plaintiff wants to preserve state law claims based on the same facts as an action it has brought in federal court, it should be obligated to plead them, or at least attempt to plead them, in the federal court; and (4) whether the interests of federalism or state sovereignty are implicated by this case."

This Court should reverse the Court of Appeals Order because the terse, one paragraph, four sentence explanation of the motion panel's *ratio decidendi* quoted general principles of res judicata, but absolutely ignored the two controlling Michigan precedents that squarely apply to the specific situation presented in this case. The decision is directly contrary to this Court's decision in *Pierson Sand & Gravel v Keeler Brass Co*, 460 Mich 372 (1999) and to the Court of Appeals own precedent in *Bergeron v Busch*, 228 Mich App

618 (1998) lv den 461 Mich 898 (1999). By denying Charlene Tate her day in court, the peremptory order is materially unjust. This Court should reinstate the legally correct summary disposition denial by the trial court, and remand the case to the circuit court for settlement or trial.

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Statement Of Facts

A. The Rape Of Charlene Tate

On Sunday, February 18, 2001, Keith Fields, a Corrections Officer for the City of Dearborn, raped Charlene Tate, a prisoner of the Dearborn Jail who was serving a 90-day sentence for shoplifting. After an investigation, Fields was charged with two counts of criminal sexual conduct third degree. He later pled guilty to two counts of criminal sexual conduct second degree and was imprisoned.

B. The Legal Proceedings

1. The Federal §1983 Suit

On July 11, 2001, Ms. Tate filed suit in the United States District Court for the Eastern District of Michigan asserting in Count I a constitutional tort claim under 42 USC §1983 against the City of Dearborn and Fields (Federal Complaint Docket No. 01-72605, Apx pg 1a). With respect to Dearborn, the §1983 municipal liability claim alleged a special custodial relationship with Charlene Tate with affirmative duties under the Eighth and Fourteenth Amendments to the Constitution. Ms. Tate further alleged that Dearborn was deliberately indifferent to her federal constitutional right to be free from cruel and unusual punishment because the City failed to prescreen, train or supervise its employees, including Fields (Federal Complaint Count I ¶26, Apx pg 5a).

Count II alleged a Michigan state law gross negligence claim that was focused on Fields, not Dearborn, which enjoys Michigan governmental immunity under MCL 691.1407. Count III asserted a Michigan law assault and battery claim against Fields (Federal

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Complaint Counts II and III, Apx pp 7a and 9a). The federal lawsuit was assigned to judge Nancy Edmunds who immediately entered an order on August 2, 2001 dismissing the Michigan state law claims (Federal Order Dismissing State Law Claims, Apx pg 12a).

On August 6, 2002, Judge Edmunds granted Dearborn's motion for summary judgment (Order Granting Dearborn's Motion for Summary Judgment, Apx pg 14a). With respect to Tate's claim that Dearborn failed to properly screen Fields, the judge held that, as a matter of §1983 law, Dearborn sufficiently screened Fields (Order Granting Dearbonr's Motion for Summary Judgment pp 8-9, Apx pp 21a-22a). As to Tate's §1983 failure to train or supervise claim, the judge said that as a matter of law, she failed to identify a government policy that was the "moving force" behind the injury alleged and that Plaintiff had identified no particular policy deficiency that was the actual cause of Ms. Tate's constitutional injury. (Order Granting Dearborn's Motion for Summary Disposition pp 9-11, Apx pg 22a-24a). The judge mistakenly assumed that Ms. Tate's gross negligence claim was against the City, but properly stated the obvious, that such a suit against Dearborn was not maintainable based on absolute governmental function immunity for governmental agencies under MCL 691.1407(1). The federal §1983 case against the imprisoned and uncollectible Fields remained pending until March 2, 2004 when Tate submitted to a voluntary dismissal (Order for Voluntary Dismissal, Apx pg 35a). Plaintiff did not appeal the summary judgment ruling in favor of Dearborn.

2. <u>The Wayne Circuit Court Elliott-Larsen Suit</u>

On February 17, 2004, Ms. Tate filed the current Wayne Circuit suit based on Michigan's Elliott-Larsen Civil Rights Act [ELCRA], MCL 37.2101 et seq. asserting sexual

harassment and discrimination in public accommodations or services (Wayne Circuit Complaint Docket No. 04-404500-NO, Apx pg 26a). The complaint alleges that Dearborn's employee Fields "implicitly and/or explicitly informed Plaintiff that she would be mistreated and/or treated differently and/or denied accommodations or services if she did not submit to said harassment and rape ... ." (Complaint ¶10, Apx pg 28a) The complaint further alleges that Tate was "denied equal use of Defendant's facility/institution and all accommodations and services related thereto as compared to all other similarly situated persons." Complaint ¶13, Apx pg 28a). The complaint further alleges that, as his employer, Dearborn is liable for "quid pro quo" harassment by Fields because "Fields was in a position of authority over Plaintiff, Fields used that authority to mistreat and rape Plaintiff, and Fields explicitly or implicitly informed Plaintiff that if she did not comply with his demands and/or she opposed his requests, he would cause problems for Plaintiff and affect her sentence, how she served her sentence and/or other aspects of her confinement such as meals and other accommodations." (Complaint ¶¶17, 20, Apx pg 29a). Citing MCL 37.2302, Plaintiff asserted that ELCRA provides that "a person, political subdivision of the state, agency of the state or other legal entity shall not deny any individual the full and equal use of services, facilities or accommodations of a place of public accommodation or public service because of sex." (Complaint ¶33, Apx pg 37a).

Dearborn moved for summary disposition claiming that the Michigan ELCRA suit is barred by the prior federal §1983 suit or that the ELCRA claim failed to state a claim for relief. Plaintiff vigorously opposed the motion. At the March 4, 2005 hearing, Plaintiff responded that an ELCRA quid pro quo sexual harassment claim is completely different

from a §1983 claim. Judge Daphne Means Curtis ruled that sexual discrimination under ELCRA was not an issue that was raised or decided or necessarily determined in the federal district court, and therefore principles of res judicata and collateral estoppel do not apply (Order Denying Summary Disposition, Apx pg 37a).

3. The Court Of Appeals Peremptory Reversal/Denial Of Reconsideration.

Dearborn sought interlocutory relief at the Court of Appeals and Plaintiff responded in vigorous opposition, asserting inter alia, that the posture of this case is "on all fours" with the case of *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379 (1999) and with the Court of Appeals' earlier decision in *Bergeron v Busch*, 228 Mich App 618, 627-628 (1998) lv den 461 Mich 898 (1999) which are binding precedent under the rule of stare decisis. Nonetheless, on May 17, 2005, the Court of Appeals issued an Order peremptorily reversing and holding that "principles of res judicata bar plaintiff's later state action" (Court of Appeals Order, Apx pg 41a). Plaintiff filed a timely Motion for Reconsideration on June 7, 2005 which the Court of Appeals denied on June 28, 2005.

On January 13, 2006, this Court granted Plaintiff's leave application (Order, Apx pg 42a).

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Law And Argument

I. This Case Is Procedurally On All Fours With *Pierson Sand & Gravel*, And The Federal §1983 Claim Is Not Res Judicata To The Subsequent Michigan ELCRA Claim.

A. Standard Of Review

The question whether res judicata bars a subsequent action is reviewed de novo by the Supreme Court. *Adair v State of Michigan*, 470 Mich 105, 119 (2004) citing *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379 (1999). The Court also reviews de novo a decision to grant or deny summary disposition. *Maiden v Rozwood*, 461 Mich 109, 118 (1999). A motion like the present one brought by Defendant under MCR 2.116(C)(7), "claim barred because of prior judgment," may, but need not be supported by affidavits, depositions, or other documentary evidence, and the opposing party need not reply with supporting material. The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant. *Maiden* at 119, citing *Patterson v Kleiman*, 447 Mich 429, 439, n 6 (1994).

B. Under *Pierson Sand & Gravel*, The Federal §1983 Claim Does Not Bar The Michigan ELCRA Claim.

Subject to certain exceptions, the doctrine of res judicata bars subsequent relitigation based upon the same transaction or events, regardless of whether the subsequent litigation was in a federal forum or a state forum. *Pierson Sand & Gravel, Inc v Keeler Brass Co*, 460 Mich 372, 379 (1999).

This case, like *Pierson Sand* involves such an exception. When the prior action

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occurred in federal court, the applicability of res judicata is determined under federal law. *Id.* at 380-381. The four elements required for res judicata under federal law are: "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies'; (3) an issue in the subsequent action which was litigated or which should have been litigated in the prior action; and (4) an identity of the causes of action." *Browning v Levy*, 283 F3d 761, 771-772 (CA 6 2002).

In *Pierson Sand*, this Court first reiterated its fidelity to its traditional "broad application of res judicata," but then agreed with the *Pierson* Court of Appeals panel that *Pierson* involved the "exceptional case where it is abundantly clear that the federal court would decline to exercise jurisdiction over state claims that were not submitted to it." *Pierson Sand*, 460 Mich at 381-382.

Here, the §1983 cause of action raised in federal court and the ELCRA claim in the Wayne Circuit Court are not identical. The federal case against Dearborn concerned whether Dearborn, as a municipality, had a custom or policy that violated Ms. Tate's federal civil rights to due process of the law and her Eighth Amendment right to be free from cruel and unusual punishment (Opinion Granting Summary Judgment, Apx pg 14a). In her opinion, Judge Edmunds specifically recognized that a municipal §1983 defendant is not liable simply because it employs a tortfeasor (Opinion Granting Summary Judgment, Apx pg 14a). In dismissing the §1983 claim, Judge Edmunds said:

> "It is undisputed that Defendant Field's sexual assault on Plaintiff itself amounted to a constitutional violation.
>
> * * *
>
> As recognized earlier, a respondeat superior argument, based solely on an employer/employee relationship with a tortfeasor is not enough to hold a defendant City liable. A plaintiff must be able to identify a **government**

> **policy or custom that caused** the **plaintiff's injury and the municipality through this policy must have been the moving force behind the injury alleged."** (Order Granting Summary Judgment pp 9-10, Apx 22a-23a, emphasis added).

By contrast, in the ELCRA claim set forth in the Michigan case, but not pleaded in the federal case, the complaint asserts a violation of Michigan's anti-discrimination provisions regarding public accommodations and public services. The purpose of that Act is to prevent discrimination directed against a person because of that person's membership in a certain class and to eliminate the effects of offensive or demeaning stereotypes, prejudices and biases. *Radtke v Everett*, 442 Mich 368, 379 (1993); *Miller v CA Muer Corp*, 420 Mich 355, 362-363 (1984).

In relevant part, MCL 37.2302(a) prohibits discrimination as follows:

"Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodation because of ... sex, ..."

Under MCL 37.2103(g), (h) not only is an individual perpetrator of the violative acts covered, the employer, here the City of Dearborn, is a "person" under the language of the statute and an agent of the employer is also the "employer." MCL 37.2201(a). Further, under subsection (i), **"Discrimination because of sex includes sexual harassment which is defined as "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature ..." including where *(i)* Submission to the conduct or communication is made a term or condition either explicitly or implicitly to obtain ... public accommodations or public service;" or *(ii)* "Submission to or rejection of the conduct or communication by an individual is**

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used as a factor in decisions affecting the individual's ... public accommodations or public services, ...;" or *(iii)* "The conduct or communication has the purpose or effect of substantially interfering with an individual's ... public accommodations or public services ... or creating intimidating, hostile, or offensive ... public accommodations, public services ... environment." Clearly, rape may be the basis for a sexual harassment claim under ELCRA, and the employer itself may have respondeat superior liability for the rape. *Champion v Nationwide Security, Inc*, 450 Mich 702 (1996); *McCalla v Ellis*, 180 Mich App 372 (1989).

Here, comparing the federal §1983 claim with the Michigan ELCRA claim, it is clear that the claims are totally different. While the claims arose from the same event, the federal claim alleges the violation of federal constitutional rights for which the City has no vicarious liability for the torts of its employee. By contrast, under ELCRA there is a valid respondeat superior claim against Dearborn. The fourth element for res judicata is not satisfied.

This ELCRA claim clearly was not litigated in the §1983 case, and, under *Pierson Sand*, even though the federal court would have had authority to hear that claim had it been brought in that forum, that authority to hear the claim does not support a res judicata ruling in the state court. In *Pierson Sand*, as here, the federal claims (in that case CERCLA), were dismissed by way of summary judgment before trial. The plaintiff then filed a state court suit under the Michigan Environmental Response Act (MERA). The Supreme Court in *Pierson Sand* held that when federal claims are dismissed prior to trial, "the federal court clearly would have dismissed the state claims if there are no exceptional circumstances that would give the federal courts cause to retain supplemental jurisdiction." *Pierson Sand* at

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384. This is so because:

> [W]e can confidently surmise that, as a general rule, where, as in the instant case, all federal claims are resolved before trial, federal courts will decline to exercise supplemental jurisdiction over remaining state law claims, preferring to dismiss them without prejudice for resolution in the state courts. *Id.*

Further, as the *Pierson Sand* Court recognized, "The goal of res judicata is to promote fairness, not lighten the loads of the state court by precluding suits whenever possible." *Pierson Sand* at 383.

Here, likewise there is no indication that any exceptional circumstances exist such that Judge Edmunds would have retained supplemental jurisdiction over the ELCRA claim had it been brought in the federal suit. In fact, Judge Edmunds has regularly declined supplemental jurisdiction when granting summary judgment on §1983 claims.[1] Here, there was no significant federal policy in question. Nor is there any question that any federal judicial resources were expended to consider any state law claims. Clearly, based on the facts, her dismissal of the supplemental state law claims within 3 weeks of the filing of the federal case, and her history of refusing to retain such claims, Judge Edmunds would not

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[1] Review of Judge Nancy Edmunds' summary judgment rulings in cases with supplemental Michigan law claims establishes that she routinely dismisses the state law claims without prejudice so that plaintiffs may pursue the claims in the Michigan courts. Plaintiff has discovered a dozen such cases: *Davis v City of Detroit Fire Dept*, 2005 US Dist LEXIS 12008 *6 (E.D. Mich 2005) [§1983 case]; *Corporate Auto v Melton Molars, Inc*, 2005 U.S. Dist LEXIS 9162 (ED Mich 2005); *Perry v Beebe*, 1997 US Dist LEXIS 13442 (ED Mich 1997) [§1983]; *Asker v Mifsud*, 1994 US Dist LEXIS 20055 *1 (ED Mich 1995) [§1983]; *Wood v Chrysler Corp*, 1993 US Dist LEXIS 19921*7 [remanding CRA claims]; *Caprioni v Prudential Securities*, 1992 US Dist LEXIS 20558 **22-23 (ED Mich 1992); *Havestick v Enterprises v Financial Fed Credit Union*, 805 F Supp 1251, 1261 (ED Mich 1992) [§1983]; *Heath v Highland Park School Dist,* 8001 F Supp 1470, 1478 (ED Mich 1992) [§1983]; *Was v Young*, 796 F Supp 1041, 1054 (ED Mich 1992) [§1983].

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have retained supplemental jurisdiction over the Michigan ELCRA claim had it been brought in the federal suit, or had Plaintiff moved to amend her complaint to bring the claim.

In fact, the Court of Appeals so held even before the Supreme Court decision in *Pierson Sand*. In *Bergeron v Busch*, 228 Mich App 618, 627-628 (1998) lv den 461 Mich 898 (1999) the Court said:

> Most state and federal courts have held that when the federal claim in a federal action is dismissed before trial and it is clear that the federal court would have declined to exercise jurisdiction over a related state claim that could have been raised in the federal action through pendent [now supplemental] jurisdiction, a subsequent action in state court on the state claim that would have been dismissed without prejudice in the prior federal action is not barred by the doctrine of res judicata. [Citations omitted.]

The Court of Appeals peremptory reversal order completely ignored these precedents.

C. The Court Of Appeals' Four Sentence Peremptory Reversal Order.

In relevant part, The May 17, 2005 Order states:

> Defendant correctly argued that, where the federal court granted summary judgment to the defendant, priniples of res judicata bar plaintiff's later state action. Res judicata has been construed "as applying both to claims actually raised in the prior action and to 'every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not.'" *Limbach v Oakland Co Bd of Rd Comm'rs*, 226 Mich App 389, 295-396; 573 NW2d 336 (1997) (citation omitted). Plaintiff could have raised the instant claim, which arose from the same transaction as did the prior litigation, but chose not to do so. Res judicata, or claim preclusion, "bars a subsequent action between the same parties when the evidence or essential facts are identical." *Dart v Dart*, 460 Mich 573, 586; 597 NW 2d 82 (1999).

The first sentence simply announced the Court of Appeals holding. In the second and fourth sentences, the Court of Appeals quoted broad, general rules of res judicata law from two cases that articulate basic res judicata rules, and that Plaintiff has no quarrel with, but the

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Order completely failed to consider the specific res judicata law exception articulated in *Pierson Sand & Gravel* that is identical to, and applicable to, the procedural posture of this case.

First, *Limbach v Oakland Co Bd of Comm'rs,* 226 Mich 389, 395-396 (1997), is cited by the Court for the proposition that res judicata applies "both to claims actually raised in the prior action and to 'every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not.'" Plaintiff has no dispute with that quote as a general statement of the law, but that statement and the *Limbach* case fail to address the specific issue of the interplay between successive state and federal claims suits involving different claims and the federal exercise or non-exercise of supplemental jurisdiction that *Pierson Sand* and *Bergeron* specifically addressed. That is the issue squarely presented here. Thus, the *Limbach* decision provides no guidance to the issue at hand.

Likewise, *Dart v Dart*, 460 Mich 573, 586 (1999), is also cited for the similar broad general proposition that res judicata, or claim preclusion, "bars a subsequent action between the same parties when the evidence or essential facts are identical." Again, Plaintiff does not disagree with this general proposition, but reiterates that this "black letter law" does not address the present posture of the federal dismissal and subsequent state law action. Further, significantly, *Dart* was decided 12 days after *Pierson Sand*, and it appears later in the same volume 460 of Michigan Reports. Yet, the facts and procedural posture of the two cases are so different that the *Dart* opinion does not even mention the Pierson Sand decision. *Dart* is a divorce case involving the enforcement of a decree entered by the English courts. It is

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wholly irrelevant to the interplay of res judicata in federal and state court suits which is the issue here.

The Court of Appeals decision, in fact, appears to bottom upon the principle the Court stated in the third sentence – that Plaintiff could have raised her ELCRA claim in the federal case, but did not, even though it arose from the same transaction. But this fact is not dispositive under the *Pierson Sand* exception.

In *Pierson Sand*, the majority clearly found that plaintiff's claim fell into one of the category of "special cases" the Court had earlier referred to in *Hackley v Hackley*, 426 Mich 582, 584 (1986). The *Pierson Sand* majority agreed with the Court of Appeals application of the exception to res judicata set forth in the last sentence of 1 Restatement Judgments, 2d, §25, comment e, illustration 10, pp 213-214:

> "[U]nless it is clear that the federal court would have declined as a matter if discretion to exercise that jurisdiction **(for example, because the federal claim, though substantial, was dismissed in advance of trial),** the state action is barred." (emphasis added)

The *Pierson Sand* Court said, "We find that this case is a stellar example of one in which the Restatement Comment [exception] should apply." 460 Mich at 382.

The *Pierson Sand* majority went on to remind practitioners and judges that res judicata **"is not a constitutional mandate that must be carefully construed to maintain its integrity, but only a tool created by the courts."** (emphasis added). Id. Further, "[c]onsidering comity as well as general fairness, we conclude that judicial efficiency should not prevail under these circumstances." 460 Mich at 386.

Accordingly, on proceedings that are procedurally identical to the way the proceedings unfolded in this case, this Court, little more than five years ago, held that:

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> [W]here the district court dismissed all plaintiff's federal claims in advance of trial, and there are no exceptional circumstances that would give the federal court grounds to retain supplemental jurisdiction over the state claim, then it is clear that the federal court would not have exercised its supplemental jurisdiction over the remaining state law claims. 460 Mich at 387.

So it is here. Because **"[t]he goal of res judicata is to promote fairness, not lighten the loads of the state court by precluding suits whenever possible,"** it is the specific exception to res judicata set forth by the *Pierson Sand* rule and the *Bergeron* rule and not the general rules of res judicata that should have been applied to this case.

Here, the claim for municipal liability against Dearborn that was dismissed in the federal case is entirely distinct from the state law sex discrimination by sexual harassment claim in the state case. No exceptional circumstances exist here, and based upon her actual history in similar cases and situations, Judge Edmunds clearly would have declined jurisdiction. The trial court correctly concluded that the ELCRA claim was not barred by res judicata. The peremptory order of the Court of Appeals must be reversed.

II. Michigan Courts Have A Compelling State Interest In Vindicating Michigan's Laws, And A Plaintiff Should Not Be Required To Plead Or Attempt To Plead A Michigan Statutory Cause Of Action In Her Federal Question Lawsuit In Order To Avoid A Subsequent State Court Res Judicata Determination.

As a matter of federalism, as well as of state sovereignty, and the preservation of the institutional autonomy of the state judicial system, our federal courts are properly reluctant to exercise supplemental jurisdiction to construe ambiguous state law. If a federal court does err in this regard, it may unnecessarily impede state action, and will almost certainly cause state courts to go to the effort of clarifying a confusion in state law for which the federal courts, and not the state legal process itself, bear responsibility.

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The Tenth Amendment to the United States Constitution recognizes the reservation of state sovereignty. US Const, Am X. Michigan has the power to exercise, and the responsibility to protect, that sovereignty. Indeed, as a function of state sovereignty, this Court has frequently reminded in its decisions that while federal civil rights precedent may be persuasive, it is not binding in interpreting the Michigan Civil Rights Act. *Rasheed v Chrysler Corp*, 445 Mich 109 (1994). As Justice Markman recently recognized in his dissenting opinion in *Melson v Prime Insurance Syndicate, Inc*, 472 Mich 1225, 1232 (2004), a case involving certified questions:

> "There are few elements more fundamental to a state's sovereignty than the maintenance and preservation of its own legal institutions. There is perhaps no more indispensable badge of sovereignty than the ability of a government to enforce its own laws."

Against this backdrop of federalism and state sovereignty, the Michigan courts clearly have a compelling state interest in vindicating Michigan's laws, here the contours of the Elliott-Larsen Civil Rights Act, and a strong interest in allowing a citizen of this State to have her day in court on a question of state law.

To the extent that it may be suggested that a plaintiff should be obligated to plead or attempt to plead her claim in federal court because to do otherwise encourages "gamesmanship," the facts of this case belie that claim. While it is true that Plaintiff could have included, but did not, her ELCRA claim in her 2002 §1983 federal suit, when she ultimately filed the state court ELCRA claim on February 17, 2004, she did so not with the benefit of any judicial tolling, but within the three year period of limitations in MCL 600.5805(9). Ms. Tate's supplemental Michigan claims for gross negligence and assault and battery in the federal case were immediately dismissed without prejudice in August 2001 by

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Judge Edmunds within three weeks of the filing of the §1983 suit. In her dismissal order, she specifically pointed to juror confusion and cited *Carnegie-Mellon University v Cahill*, 484 US 343 (1988), for the proposition that usually when all federal claims are dismissed before trial, a federal court should dismiss state claims as well. (Federal Order Dismissing State Law Claims, Apx pg 13a).

It would thus have been futile to move to amend to add the ELCRA claim in the federal case after Judge Edmunds had already declined jurisdiction over those other Michigan claims. As a result, Plaintiff had no choice but to pursue the federal case until the judge dismissed the §1983 claim against Dearborn and until it became obvious that any judgment obtained against the remaining defendant Fields would certainly be uncollectible. Accordingly, this case is factually better than the situation in *Pierson Sand* where Justice Taylor, in his dissent, remarked that plaintiffs could have included their state law MERA count in their third amended complaint in federal court which they filed three years into the federal lawsuit. *Pierson Sand*, at 388 (Taylor J, dissenting). Plaintiff had no ability to even attempt to plead the ELCRA claim in the federal case after Judge Edmunds entered her August 2, 2001 dismissal of the supplemental state law claims three weeks after the original case was filed.

Here, there is simply no valid reason, be it "encourag[ing] gamesmanship" or otherwise, to conclude that Plaintiff was required to bring, or to try to bring, her Michigan ELCRA claim in the federal lawsuit. Plaintiff has not purposefully "split" her cause of action. The federal district judge eliminated any consideration of Michigan claims at the outset of the federal case.

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Nor is Plaintiff asking for "two bites of the apple." This is not a case of parallel remedies. She brought a §1983 claim in federal court that failed. Clearly, the federal court would not have heard the alternate Michigan ELCRA claim which she timely brought in state court.

This does not require the state court to speculate. The federal court early on exercised its discretion not to hear state law claims. Attempting to bring the ELCRA claim in federal court would have been futile. Beyond the reluctance of federal courts to exercise supplemental jurisdiction over lone state claims and beyond the fact that Judge Edmunds in fact declined supplemental jurisdiction, the principles of federalism and state sovereignty compel this Court to follow the salutary rule of *Pierson Sand* and to decide on the substantive merits Michigan claims brought by Michigan citizens.

Relief Requested

The terse Court of Appeals order granting summary disposition on res judicata ignores *Pierson Sand* and the Court of Appeals own decision in *Bergeron*. Here there are no exceptional circumstances that would have caused the federal district court to have retained jurisdiction over the ELCRA claim if Plaintiff had brought that claim in federal court with the §1983 claim she dismissed. Consistent with principles of federalism and state sovereignty, when she grants summary judgment on federal claims, Judge Edmunds routinely dismisses any supplemental state law claims without prejudice so that the plaintiff can pursue them in the proper forum, the Michigan court. Charlene Tate is entitled to her day in court on the substantive merits of her Elliott-Larsen Civil Rights Act claim. This Court should reverse and remand the case to the trial court for settlement or trial.

Respectfully submitted,

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